In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 318

JOHN JOSEPH ZIAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is at 360 F. 2d 850.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1966. A petition for rehearing was denied on June 9, 1966. The petition for a writ of certiorari was filed on July 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the closing argument of government counsel required reversal of petitioner's conviction.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Illinois of knowingly receiving and facilitating the transportation and sale of narcotic drugs, in violation of 21 U.S.C. 174, and conspiracy to commit that offense (R. 3-5, 18-19).[1] He was sentenced to imprisonment for a period of eight years on each count, the terms to run concurrently (R. 20). The court of appeals unanimously affirmed (Pet. App. A).

1. The government's evidence at trial may be summarized as follows:

On November 12, 1963, Narcotics Agent Turnbou arranged through an informant to purchase narcotics from Sylvester Moore, petitioner's alleged co-conspirator, who died before the time of indictment (App. 13). The sale was arranged by telephone, Moore telling the informant that he would call him back. At about 7:15 p.m., petitioner came to Moore's home and remained for a few minutes (App. 25). At about 7:30 p.m., Moore called the informant and told him he would bring over the narcotics (App. 13).

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[1] The record consists of the single volume "Original Record on Appeal" ("R."), the four volume transcript of proceedings ("Tr.") and petitioner's Appendix filed in the court of appeals ("App.").

Moore subsequently came to the informant's home and sold the narcotics for $900 (App. 13-14, 25).

On November 26, 1963, Agent Turnbou again arranged to purchase narcotics from Moore. The time set for delivery was approximately 8:30 p.m. Petitioner arrived at Moore's home at about 7:30 p.m. and remained for ten minutes. Moore then left and went directly to deliver the narcotics (App. 14). After the transaction, Moore proceeded to a rendezvous with petitioner, at which Moore handed an unidentified object to petitioner (App. 14, 17-18, 22). Moore then went home (App. 18).

On December 9, 1963, Agent Turnbou made similar arrangements. Delivery time was set for 8:00 p.m. Petitioner went to Moore's home at about 6:45 p.m. About fifteen minutes later, Moore left to make the narcotics delivery (App. 15). After the sale, Moore proceeded to a location where petitioner was parked in his car and handed petitioner a large quantity of currency (App. 15, 18-23, 25-26). Moore then went home (App. 21).

On April 27, 1964, petitioner was arrested pursuant to a warrant as he alighted from his truck (App. 8, 23). A search of the vehicle revealed a brown paper sack containing heroin lodged over the sun visor (App. 23, 27-28). Petitioner denied knowing Moore, receiving money from Moore or having been at any of the locations reported by observing agents (App. 27). The narcotics found at the time of arrest formed the basis of the substantive count.

2. In closing argument, defense counsel maintained that the government had "framed" petitioner on the

substantive count by planting the narcotics in his truck at the time of arrest (Tr. 355-362). This conclusion, counsel stated, was supported by the facts that one agent testified that the narcotics were in a "brown manila envelope" while another agent testified that there was a brown paper bag with the envelope inside it (Tr. 357); that the package was not submitted for fingerprint analysis (Tr. 358); and that government counsel did not call as witnesses two agents who were present at the arrest and who no longer worked for the Bureau of Narcotics (Tr. 360-361). In addition, defense counsel repeatedly asserted his personal belief that petitioner was the one telling the truth (Tr. 351, 358-359).

Government counsel responded to the argument that petitioner had been "framed" in part as follows (Tr. 364-365):

> The two men he referred to were two agents that have left here, Agent Russo, and the other agent was Aison. He said the Government didn't call them.
>
> Ladies and gentlemen, that big tremendous machine that he indicates is the Government is me. I didn't call them. I didn't ask them to come in here. I didn't subpoena them. And I will tell you why I didn't call them in to testify —because I won't insult this man right here, Narcotic Agent Hughes. I'm not going to put those men on the stand to swear to God and in front of you that he is telling the truth. I know him and I won't do it. And if you think he got up on that stand as part of a master plot to frame John Joseph Ziak, then I say to you this:

> It's a sad day not for Ziak, not for the country, but for everybody when the Federal Government would attempt to frame somebody. And I submit to you that we have not, we didn't in this case, and we won't. And there is a very good point to bring out on that.
>
> He said we framed him. That's what he is telling you—that all of these agents got up on the stand and committed perjury. I told you in advance that I had talked to all the witnesses, and I suppose the next thing is that I suborned the perjury.

Government counsel then sat on the witness stand and related what testimony, in his view, would have been produced in a true "frame-up" (Tr. 365).[2] Counsel then stated:

> Ladies and gentlemen, these agents came in and told you the truth. They told you the way it happened * * * And you heard men get up there and tell the truth.
>
> You determine who told the truth * * *.

ARGUMENT

1. Government counsel's remarks in closing argument, set forth in the Statement, *supra*, pp. 4-5, were made in response to charges in petitioner's argument that the government had deliberately "framed" petitioner; that relevant evidence and testimony had pur-

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[2] Defense counsel's objection to any closing argument while sitting in the witness stand (Tr. 365) was overruled. While the record does not indicate how long counsel occupied the seat, it was, in fact, about 45 seconds covering about nine transcript lines of final argument. See Second Supplemental Record on Appeal, affidavit by Douglas Brown.

posefully been suppressed; and also in response to assertions by petitioner's counsel of his personal belief in petitioner's credibility. Petitioner's argument therefore "invited the reply which petitioner * * * now attacks." *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15. See also, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-242; *Crumpton* v. *United States*, 138 U.S. 361, 364; *United States* v. *Kiamie*, 258 F.2d 924 (C.A. 2), certiorari denied, 358 U.S. 909; *United States* v. *Battiato*, 204 F.2d 717, 718-719 (C.A. 7), certiorari denied, 346 U.S. 871. Defense counsel, moreover, interposed no contemporaneous objection to the substance of the government's remarks, but only to counsel's presence in the witness chair during part of his argument (Tr. 365). While some of government counsel's remarks were subject to criticism, see *Greenberg* v. *United States*, 280 F.2d 472 (C.A. 1); *United States* v. *White*, 324 F.2d 814, 816-817 (C.A. 2), we submit that they did not constitute reversible error in these circumstances. *United States* v. *Socony-Vacuum Oil Co.*, *supra*; *Medlin* v. *United States*, 353 F.2d 789, 795-796 (C.A. 6), certiorari denied June 6, 1966, No. 1228, O.T., 1965.

2. The court of appeals rebuked government counsel for sitting in the witness chair during closing argument, but did not reverse the conviction on this account (Pet. App. 5-6). There was, in fact, only a brief period during which counsel occupied the witness chair and told the jury what they would have heard had the government actually framed petitioner. (See footnote 2, *supra*, p. 5.) The jury, therefore,

could not have viewed government counsel as a witness giving evidence or testimony relevant to the factual issues in the case. Moreover, contrary to petitioner's assertion (Pet. 13-14), the jury was not left unguided by the trial court concerning argument of counsel. The court affirmatively instructed the jury that "[s]tatements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the contentions of the parties" (Tr. 378). In these circumstances, disapproval by the court of appeals of the physical act of sitting in the witness chair during closing argument did not require reversal of the conviction. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 239.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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